IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL WRIT PETITION NO.44 OF 2005

Lalit Somdatta Nagpal,
aged: 52 years, Occ: Business,
residing at Bungalow No.36,
Atur Park, Sion-Trombay Road,
Chembur, Mumbai-71. .... Petitioner

- Versus -

1. Shri K.K. Pathak,
Spl. Inspector General of
Police, Kolhapur Range.

2. Shri Ramesh Vasaikar,
Asstt. Commissioner of
Police (Sales Tax), Crime
Branch, Mumbai.

3. The State of Maharashtra,
(At the instance of Karveer
Police Station, Kolhapur,
C.R.No.39/2004). .... Respondents

Shri Amin Solkar for the Petitioner.

AND

CRIMINAL WRIT PETITION NO.146 OF 2005

Anil Somdatta Nagpal,
aged: 50 years, Occ: Business,
residing at Bungalow No.7A/202,
Ganga Estate, Chembur,
Mumbai-400 071. .... Petitioner

- Versus -

1. Shri K.K. Pathak,
Spl. Inspector General of
Police, Kolhapur Range.

2. Shri Ramesh Vasaikar,
Asstt. Commissioner of
Police (Sales Tax), Crime
Branch, Mumbai.

3. The State of Maharashtra,
(At the instance of Karveer
Police Station, Kolhapur,
C.R.No.39/2004). .... Respondents

Shri R.M. Agarwal for the Petitioner.

Sarvasri V.A. Thorat, Advocate General,
with D.S. Mhaispurkar, Addl. Public
Prosecutor, for the State in both
the Petitions.

CORAM: R.M.S. KHANDEPARKAR &
P.V. KAKADE, JJ.

DATED: MARCH 11, 2005

JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. Heard. Rule. By consent, rule made returnable forthwith in both the petitions. Since common question of facts and law arise in both these petitions, they were heard together and are being disposed of by this common judgment.

2. The petitioners seek to challenge the provisions of Section 21(3) of the Maharashtra Control of Organised Crime Act, 1999, hereinafter referred to as "the MCOCA" as also the approval dated 31-10-2004 granted under Section 23(1)(a) of the MCOCA by the respondent No.1 for applying the provisions of the MCOCA in relation to the C.R. No.39/2004 against the petitioners. The applicability of the provisions of the MCOCA to the offences alleged to have been committed by the

petitioners is sought to be challenged on various grounds.

3. Pursuant to the raid at the factory premises of one Deepak Mundada wherein two iron tanks of 12000 and 6000 litres capacities, a motor tanker containing benzin, greenish lubricating in 200 litres barrel, 45 kilos of white powder in 5 gunny bags and a motor tanker containing mineral turpentine oil were found and seized under panchnama, and on recording of the statement of Ranjit Pandurang Desai a case is stated to have been registered under the C.R. No.39/2004 with the Karveer police station, Kolhapur, against 11 persons named therein as the accused with the allegation that Deepak Mundada, in collusion with other accused persons, engaged in adulteration of petroleum products and thereby committed offences punishable under Sections 3 and 7 of the Essential Commodities Act, 1955, hereinafter referred to as "the EC Act" as well as under Section 3 of the Petroleum Storage and Distribution Act, 2000, hereinafter referred to as "the PSD Act". It is revealed that out of 11 accused persons, 9 accused persons were arrested and produced before the Chief Metropolitan Magistrate, Kolhapur and though initially they were remanded to judicial custody, subsequently they were released on bail. The investigation thereafter was transferred to the Crime Branch, Mumbai

pursuant to the orders of the Director General of Police, Maharashtra. The petitioners herein preferred anticipatory bail application and though initially succeeded in getting protection against their arrest, same came to be dismissed in August, 2004. They then approached this Court as well as the Apex Court but could not satisfy the Court to secure any relief except that for a period of two weeks from the date of disposal of the S.L.P. the police were not expected to arrest the petitioners. That was the order passed on 14-12-2004.

4. It is not necessary to refer to all the grounds of challenge and the petitions can be conveniently disposed on consideration of only one ground which relates to the order of approval for applicability of the MCOCA to the petitioners. It is the contention on behalf of the petitioners that the provisions of the MCOCA can be applied to the persons against whom more than one charge-sheet had been filed in relation to the cognizable offences punishable with punishment of minimum three years. Under Sections 3 and 7 of the EC Act the maximum punishment prescribed is of two years as per the Essential Commodities (Special Provisions) Act, 1981, hereinafter referred to as "the ECSP Act" and which was in force at the relevant time. It is therefore the contention of the petitioners that the

orders dated 31-10-2004 granting approval under Section 23(1)(a) of the MCOCA by the respondent No.1 clearly indicate that the approval for application of the provisions of the MCOCA to the petitioners has been granted contrary to the provisions of the MCOCA and, therefore, the said orders cannot be sustained. The offences which would be required for the purpose of constituting the continuing unlawful activity under the provisions of MCOCA would be those which are punishable with imprisonment of three years or more and the offences for which the petitioners were charged were punishable to the maximum of two years imprisonment. The petitioners therefore pray that the the provisions of the MCOCA cannot be applied to the petitioners.

5. Undoubtedly, the offences under the provisions of the EC Act are punishable with imprisonment for a term which may extend to one year and fine in relation to the offences covered under Clause (h) or Clause (i) of sub-section (2) of Section 3, whereas in relation to the other offences, the imprisonment could be to the extent of seven years and fine. The provisions of Section 2(d) of the MCOCA defines the expression "continuing unlawful activity" to mean the activities prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment for three years or more. Obviously, the offences punishable with imprisonment for

three years or more being sufficient for the purpose of understanding what is a continuing unlawful activity under the MCOCA and since the offences under Section 3 of the EC Act are punishable to the extent of seven years, same would be covered by the definition under Section 2(d) of the MCOCA.

6. It is, however, undisputed fact that in the year 1981 the ECSP Act was brought into force for a period of 15 years from the date of its commencement. It came into force on 1-9-1982. The said Act was by way of amendment to the EC Act for the fixed period of fifteen years for dealing more effectively with persons indulging in hoarding and black marketing of, and profiteering in, essential commodities and with the evil of vicious inflationary prices and for matters connected therewith or incidental thereto. The sub-section (3) of Section 1 of the ECSP Act provided that it shall cease to have effect on the expiry of fifteen years from the date of commencement of the Act except in respect of the things done or omitted to be done before such cesser of operation of the ECSP Act, and Section 6 of the General Clauses Act, 1897 (10 of 1897), would apply upon such cesser of operation of the ECSP Act as if it had then been repealed by the EC Act.

7. The Section 2 of the ECSP Act provided that during

the continuance in force of the ECSP Act, the EC Act was to have effect subject to the amendments specified in Sections 3 to 11 of the ECSP Act. The proviso thereto provided that the amendments specified in Sections 7 to 11 were not to apply to, or in relation to, any offence under the EC Act committed before the commencement of the ECSP Act and the provisions of the EC Act were to apply to, and in relation to, such offences as if those amendments had not been made. In other words from 1-9-1982 till 31-8-1997 the provisions of the EC Act stood amended as provided under ECSP Act. Besides, once such amended provision of EC Act were to apply to the offences committed during the said period, the rights and liabilities flowing therefrom were to attract the provisions of Section 6 of the General Clauses Act. Under the amended provision of the EC Act for the relevant period, the quantum of punishment was restricted to two years. Indeed, Section 12AA(1)(f) of ECSP Act which was brought on the statute book for the relevant period in terms of Section 11 of the ECSP Act provided that all the offences under the ECSP Act shall be tried in a summary way and the provisions of Sections 262 to 265, both inclusive, of the Code of Criminal Procedure shall, as far as may be, apply to such trial, and in case of conviction in the summary trial under the said section, it shall be lawful for the Special Court to pass a sentence of imprisonment for a term not

exceeding two years.

8. As already observed above, the ECSP Act came into force on 1-9-1982 and evidently therefore it was in force for 15 years i.e., till 31-8-1997. Obviously therefore, every offence stated to have been committed under the provisions of the EC Act during the said period was triable and punishable in terms of the provisions of the ECSP Act and the maximum punishment awardable for any offence committed during the relevant period was two years. Obviously therefore, the offences punishable under the provisions of the EC Act, committed during the relevant period, could not be the offences which could be considered as those sufficient for the purpose of "continuing unlawful activity" within the meaning of the said expression under the provisions of the MCOCA.

9. The Section 23 of the MCOCA speaks of cognizance of, and investigation into, an offence under the MCOCA. It provides that notwithstanding anything contained in the Code of Criminal Procedure Code, no information about the commission of an offence of organised crime under the MCOCA, shall be recorded by a police officer without the prior approval of the police officer not below the rank of the Deputy Inspector General of Police, and no investigation of an offence under the provisions of the

MCOCA shall be carried out by a police officer below the rank of the Deputy Superintendent of Police. The sub-section (2) of Section 23 provides that no Special Court shall take cognizance of any offence under the MCOCA without the previous sanction of the police officer not below the rank of Additional Director General of Police.

10. There are three important aspects of Section 23 of the MCOCA. Firstly, it is in relation to the offence of organised crime under the MCOCA, and secondly it is the approval from the Deputy Inspector General of Police or the Police Officer of equal rank, and thirdly, the approval should be prior to the recording of the information about the offence under the MCOCA. The offence "organised crime" has been defined under Section 2(e) to mean any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency. This definition discloses two important expressions, namely, "continuing unlawful activity" which is defined under Section 2(d) and "organised crime syndicate" which is defined under

Section 2(f). The "continuing unlawful activity" means an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent Court within the preceding period of ten years and that Court has taken cognizance of such offence. The "organised crime syndicate" means a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulge in activities of organised crime. Being so, in order to apply the provisions of the MCOCA to any person, he should have been one who could be said to have committed offence as specified and defined under Sections 2(d) read with Section 2(e) and (f) of the MCOCA. This is the primary requirement of the proceedings to record information about the commission of offence under the MCOCA by any person. The second requirement is that such recording of the information has to be pursuant to the approval in that regard by the Deputy Inspector General of Police or any other Police Officer of equal rank. The third requirement and equally important one is that such approval should be prior to the recording of such information. In other words, the approval should precede the recording of the information

regarding the offence under the MCOCA.

11. Apart from the above-referred three aspects of Section 23, the most important thing which is required to be observed in relation to the said provision is that it opens with a non-obstante clause, and the requirement of prior approval for recording the information of offence is clothed with the words in the negative form. It makes the intention of the Legislature clear that the provision is mandatory in nature and not an empty formality. The non-obstante clause gives the provision of law comprised under Section 23 an over-riding effect over the other provisions of the MCOCA. The Apex Court in **Union of India and another v. G.M. Kokil and others,** reported in 1984 (Supp) SCC 196 had clearly held that it is well-known that a non-obstante clause is a legislative device usually employed to give an over-riding effect to certain provisions over other provisions, either in the same statute or some other enactment. So also in **M. Pentiah and others v. Muddala Veeramallappa and others,** reported in AIR 1961 SC 1107, it was held that the negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statute imperative. It is also not to be forgotten that the provisions of law under consideration form part of a penal statute. In **Mannalal Khetan and others v. Kedar Nath Khetan and others,**

reported in (1977) 2 SCC 424, it was held that negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statutory provision imperative and the mandatory character is strengthened by the negative form of language. It was also held that negative language is worded to emphasise the insistence of due compliance of the provisions of the statute, and therefore negative words are indicative of the legislative intent that the statute is mandatory.

12. The Apex Court in **State of Himachal Pradesh v. M.P. Gupta,** reported in 2003 AIR SCW 6887, while considering the scope of Section 197 of the Code of Criminal Procedure, held that:-

> "The mandatory character of the protection afforded to a public servant is brought out by the expression, 'no court shall take cognizance of such offence except with the previous sanction'. Use of the words, 'no' and 'shall' make it abundantly clear that the bar on the exercise power of the court to take cognizance of any offence is absolute and complete. Very cognizance is barred. That is the complaint cannot be taken notice of."

13. Considering the provisions of Section 23 of the MCOCA, the wordings thereof and bearing in mind the rule of interpretation and construction, it is obvious that the said provision of law is mandatory in nature and there has to be a strict compliance thereof. In other words, the powers given under the said statute has to be exercised strictly in consonance with the provisions of the said section and not otherwise.

14. The identical orders dated 31-10-2004 stated to have been passed in exercise of the powers under Section 23(1) of the MCOCA in both the cases under consideration read thus:-

No.CR-11/MOCA/Karveer/19800/04/6077/04

Kolhapur Dt.31.10.2004

Reference: 1) Fax No.4789/04 Dt.30.10.04 from Dy. Commissioner of Police (Enforcement), Crime Branch, C.I.D., Mumbai.
2) Even Number of this Office, Dt. 29.10.2004

Subject: Regarding grant of permission under section 23(1)(a) of MCOC Act for

applying section 3(1)(2)(4) of MCOC Act to Karveer Police Station C.R.No.39/04, under section 3 & 7 of Essential Commodities Act.

With reference and subject mentioned above, after going through the papers of the said offence and in view of the offenders background of criminal activities, it is primarily seen that the accused persons concerned in the said offence have committed offence in an organized way, which is led by Anil Somdatta Nagpal, brothers Lalit Somdatta Nagpal, Vijay Somdata Nagpal in this organized Crime and thereby collected huge property by unlawful means. Therefore under section 23(1) of Maharashtra Control of Organized Crime Act of 1999 permission is granted to apply section 3(1)(2)(4) of Maharashtra Control of Organized Crime Act of 1999 to all the accused persons, concerned in the said offence {Karveer Police Station C.R. No. 39/04, under section 3 & 7 of Essential Commodities Act & section 3 of Petroleum Storage & Distribution Act} and to take action accordingly.

Shri Ramesh Vasaikar, Asstt.

Commissioner of Police, (Sales Tax), Crime Branch, C.I.D. Brihan Mumbai will conduct the investigation of the said offence.

Sd/-

(K.K. Pathak)

Special Inspector General of Police

Kolhapur Range.

15. Plain reading of the orders would disclose that the subject of the orders is in relation to grant of permission under Section 23(1)(a) of the MCOCA for applying the provisions of Section 3(1)(2) & (4) of the MCOCA to Karveer police station C.R. No.39/2004 under Sections 3 and 7 of the EC Act. Apart from the specific reference to that effect in the subject of the order, even the orders themselves clearly speak of the decision to apply the provisions of the MCOCA on account of the petitioners having been involved with other accused persons in the commission of offences under Section 3 and 7 of the EC Act, and Section 3 of the PSD Act. The learned Advocate for the petitioners has categorically stated that there is no statute as the PSD Act in force in the State and the respondents have not been able to counter the said statement. Obviously therefore the approval under Section 23(1) is in relation to the offences punishable under Sections 3 and 7 of the EC Act

for the purpose of applicability of the provisions of the MCOCA to the petitioners.

16. The learned Advocate General did submit that though the orders refer only to the provisions of the EC Act, the fact remains that the petitioners were charge-sheeted under various other provisions of the IPC and the punishment prescribed for them is of the period exceeding three years and thus the challenge to the applicability of the provisions of MCOCA to the petitioners cannot be disputed. Apart from mere submission in that regard, nothing is placed on record to substantiate the said contention. We are unable to accept this contention on behalf of the respondents. It is a matter of record that the competent authority who had to approve the applicability of the provisions of MCOCA to the petitioners has considered only the provisions of the EC Act and the involvement of the petitioners in those offences for the purpose of applying the provisions of MCOCA to the petitioners. Being so, merely because the petitioners were also charge-sheeted for other offences that by itself cannot enure to the benefit of the respondents to contend those charge-sheets were also considered while passing the impugned orders dated 31-10-2004.

17. It was sought to be contended on behalf of the

respondents that any defect in the approval can be cured even after it is granted on similar lines as that of sanction. The contention is devoid of substance for more than one reason. First of all it is nobody's case that there is any defect in the approval order under Section 23(1)(a) of MCOCA. The order is specifically based on the involvement of the petitioners in the offences punishable under the provisions of the EC Act. There is no mention of any other offence. There is not even an affidavit by the approving authority about any such lapse and involvement of the petitioners in any other offence having been considered while issuing such order, nor any records are placed before this Court disclosing consideration of involvement of the petitioners in other offence. The Apex Court in **H.N. Rishbud and Inder Singh v. State of Delhi,** reported in AIR 1955 SC 196 had held and the same was reiterated in **A.R. Antulay v. Ramdas Sriniwas Nayak and another,** reported in (1984) 2 SCC 500 that Section 5-A of the Prevention of Corruption Act, 1947 is mandatory and not directory and that an investigation conducted in violation thereof bears the stamp of illegality. Any infirmity or illegality in the investigation may not render the outcome of a concluded trial before the Magistrate or the criminal Court to be bad in law. But it is well-settled that if the objection is raised at the initial stages regarding the illegality or

invalidity of the investigation on account of contravention of the mandatory provisions, it would be the duty of the Court to take note thereof and discourage the perpetuation of illegality.

18. Besides, any order under Section 23 of MCOCA is bound to have serious consequences. The person subjected to the proceedings under MCOCA cannot have any right to apply for the anticipatory bail and even in case of normal bail, it is subject to various restrictions. Besides, the punishment that can be imposed is also severe. The Sections 17 to 22 provide for special provisions and effect of applicability of the provisions of the MCOCA to a person. The Section 17 provides for specific rule of evidence for the purpose of trial and punishment, as also for certain presumptions in certain situations like presumption that the property possessed by such person to have been acquired by illegal activities. Under Section 18, certain confessions by the accused person to the police officer are made admissible in evidence. The Section 20 speaks of forfeiture of the property of such person. The Section 21 provides for modified application of certain provisions of the Code of Criminal Procedure. It provides that:-

"21. Modified application of certain

provisions of the Code -

(1) Notwithstanding anything contained in the Code or in any other law, every offence punishable under this Act, shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code and "cognizable case" as defined in that clause shall be construed accordingly.

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modifications that, in sub-section (2),

(a) the reference to "fifteen days", and "sixty days", wherever they occur, shall be construed as references to "thirty days" and "ninety days", respectively;

(b) after the proviso, the following proviso shall be inserted, namely -

"Provided further that if it is not possible to complete the investigation within the said period of ninety days,

the Special Court shall extend the said period upto one hundred and eighty days, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days."

(3) Noting in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence punishable under this Act.

(4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond, unless -

(a) the Public Prosecutor has been given an opportunity to oppose the application of such release; and

(b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for

believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(5) Notwithstanding anything contained in the Code, the accused shall not be granted bail if it is noticed by the Court that he was on bail in an offence under this Act, or under any other Act, on the date of the offence in question.

(6) The limitations on granting of bail specified in sub-section (4) are in addition to the limitations under the Code or any other law for the time being in force on the granting of bail."

The Section 22 deals with the subject of presumption as to the offences under Section 3 and it provides that:-

"22. Presumption as to offences under section 3.

(1) In a prosecution for an offence of organised crime punishable under section 3, if it is proved -

(a) that unlawful arms and other material including documents or papers were recovered from the possession of the accused and there is reason to believe that such unlawful arms and other material including documents or papers were used in the commission of such offence, or

(b) that by the evidence of an expert, the finger prints of the accused were found at the site of the offence or on anything including unlawful arms and other material including documents or papers and vehicle used in connection with the commission of such offence,

the Special Court shall presume, unless the contrary is proved, that the accused had committed such offence.

(2) In a prosecution for an offence of organised crime punishable under sub-section (2) of section 3, if it is proved that the accused rendered any financial assistance to a person accused of, or reasonably suspected of, an

> offence of organised crime, the Special Court shall presume, unless the contrary is proved, that such person has committed the offence under the said sub-section (2)."

Undoubtedly, some of the provisions noted above would take effect on taking cognizance of the case by the Court whereas some would take effect from the date of commencement of the investigation. Bearing all these things in mind, it is but natural that the provisions of MCOCA are required to be complied with strictly. It is settled principle of law that when the law requires a thing to be done in the manner it is prescribed, and not in any other manner, particularly when such actions are accompanied by serious consequences, there has to be due compliance of such provision of law and the prescribed procedure.

19. Once it is apparent that the approval for applicability of the provisions of the MCOCA is restricted to the offences punishable under the provisions of the EC Act, and the offences under the EC Act at the relevant time were punishable with the maximum period of imprisonment of two years, obviously the provisions of the MCOCA could not be attracted and on that count itself the petitioners are justified in

contending about the non-sustainability of the orders dated 31-10-2004 in relation to the petitioners and consequently non-applicability of MCOCA to the petitioners.

20. In the circumstances, it is not necessary to deal with the other grounds of challenge as the petitions succeed on the above discussed ground itself and while leaving the other issues open and allowing the petitions and quashing the impugned orders dated 31-10-2004 issued under Section 23(1)(a) of the MCOCA, it is to be held that the provisions of the MCOCA cannot be made applicable to the petitioners on the basis of the impugned orders. The rule is made absolute in above terms with no order as to costs.

(R.M.S. Khandeparkar, J.)

(P.V. Kakade, J.)